Due Process and Takings Concerns in Municipal Growth Management

— by Martin R. McCullough —

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by Martin R. McCullough

Local governments rely on a variety of growth management controls, including development moratoria, interim zoning, downzoning, and others. Although the use of each of these techniques has been generally condoned by the courts, each technique, to the extent it limits private property rights, raises significant concerns under due process and taking provisions of federal and state constitutions.

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The term "growth management" implies government action to limit the timing, location, extent or density of municipal growth. Such controls may take a variety of forms, including development moratoria, interim zoning, downzoning, time-limited development approvals, restricting water and sewer taps and building permits, and increasing development fees and performance standards. Although the use of each of these techniques has been generally condoned by the courts, each technique, to the extent it limits private property rights, raises significant concerns under the due process and taking provisions of federal and state constitutions.

Moratoria

The process of initiating growth controls within a municipality usually begins with the recognition that rapid population growth has become a threat to the municipality's ability to maintain an adequate level of public services. The next step typically includes a decision to study the problem, to consider methods of limiting growth, and to develop a plan that will slow the growth rate until the municipality can implement the necessary infrastructure to accommodate the larger number of citizens. Because any further development within a municipality threatens to undermine the efficacy of future growth control measures, an interim moratorium on the issuance of all residential building permits is often seen as the most effective method of preserving the status quo.

Such a severe restriction upon the use of private land might be found invalid if it were a long-term or permanent restriction, but the short-term nature of interim controls has lead to increasing acceptance of such measures. The courts have determined that a regulation that goes "too far" in limiting an owner's property rights may be a taking if the regulation fails the so-called *Penn Central* analysis.[1] The *Penn Central* test requires a court in a regulatory takings case to conduct a balancing test involving, at a minimum, the following factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the governmental action.[2] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the United States Supreme Court held that, where a property owner was alleging a taking as a result of a moratorium, the claim was to be decided using the same *Penn Central* test applicable to other regulatory takings claims.[3] In doing so, the Court rejected the argument that, because a moratorium denied a property owner all beneficial use of its property during the moratorium, the moratorium amounted to a *per se* taking of the owner's property during the moratorium period.[4] The Court reached this conclusion by returning to its prior holdings that takings claims were to be analyzed using a "parcel as a whole" approach.[5] Viewing a moratorium as a restriction on only a small portion of the owner's entire "bundle of property rights," the Court concluded that a moratorium was not a *per se* taking, and that the duration of a moratorium was but one factor that a court was to consider in the appraisal of a regulatory takings claim involving a moratorium.[6] Moratoria are used widely among land use planners to preserve the status quo pending a more permanent development strategy, and the Court in *Tahoe* noted cases from across the country that had upheld moratoria ranging

The process of initiating growth controls within a municipality usually begins with the recognition that rapid population growth has become a threat to the municipality's ability to maintain an adequate level of public services.

from a ten-month period to three years.[7] The Court added, however, that any moratorium that lasted for more than one year "should be viewed with special skepticism."[8] Throughout its opinion in *Tahoe*, the Court emphasized its view that a moratorium, to the extent it was shown to be reasonably related to allowing a government to review and modify its development-related regulations and resources, will generally be approved as long as it does not extend beyond reason.[9]

Interim Zoning

The distinction between a moratorium and an interim zoning ordinance is significant. A moratorium is a temporary suspension of

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the municipal process of considering, approving, and issuing required permits for construction. An interim zoning ordinance, on the other hand, typically involves re-zoning of property to a minimally acceptable level of development until the municipality can decide what higher or different level of development may be acceptable.[13]

Caution is advised should a municipality decide to freeze its current level of development using an interim zoning ordinance rather than a moratorium. While moratoria and interim zoning ordinances are close relatives—both being enacted for the purpose of temporarily withdrawing prior zoning—an interim zoning ordinance will likely be viewed as an exercise of the governmental authority to zone and rezone property, particularly if the practical effect is a downzoning.[14] Accordingly, an interim zoning action that is not preceded by the same notice and public hearing procedures prescribed by a municipality's code for other zoning actions is subject to invalidation by a reviewing court on procedural due process grounds.[15] Moreover, a number of state courts have refused to distinguish moratoria and interim zoning ordinances and have struck down "mere moratoria" that were enacted without advance notice or hearing.[16] Therefore, a practitioner must refer to state law to determine the applicable procedural requirements for the enactment of either a moratorium or interim zoning ordinance.

Limits on Permits

Another common tool for controlling the rate of growth in a municipality is to impose a numerical limit, or cap, on either the number of building construction permits or the number of utility tap permits which the municipality will issue on an annual basis. The establishment of caps provides one of the most direct methods of limiting growth.

Caps on building permits may be tied to the governing body's determination of the desired annual population increase. In general, building permit caps have been sustained where a connection is shown between the limitations and a good faith plan on the part of the municipality to accommodate future growth through capital facilities expansion. One of the leading cases in the area of growth management through the regulation of annual building permit issuance is *Construction Industry Association of Sonoma County v. City of Petaluma*,[14] in which the court upheld a growth management policy that limited residential building permits to 500 per year. The court in that case found that the building cap was linked to Petaluma's current water supply capacity and the city's capital improvements plan.[15] Moreover, because the establishment of building permit caps is in the nature of legislative decision-making by the governing body, such action may be taken by the municipality's governing body without holding quasi-judicial hearings for the benefit of affected property owners.[16]

The next step typically includes a decision to study the problem, to consider methods of limiting growth and to develop a plan that will slow the growth rate until the municipality can implement the necessary infrastructure to accommodate the larger number of citizens

Caps on the availability of water and sewer tap permits have the same practical effect on the developability of property as building permit caps. Caps on utility tap permits are often tied to current water and sewer system capacities and the anticipated expansion of the water supply and water and sewer treatment facilities.

In cases involving limits on building or utility tap permits, the courts have consistently refused to recognize any property right to develop property at whatever time the owner might prefer; therefore, permit limits or tap allocation programs which merely limit the timing of property development do not amount to a taking of property, since the property retains its value for future development.[17] The courts seem to be preoccupied mainly with a substantive due process review of the challenged limits.[18] The substantive due process test appears to be whether there exists a nexus between the permit limitation and future capital facilities. Caps have been held to be invalid when it appeared that they were arbitrarily applied to particular unpopular uses, such as mobile homes,[19] or where the limitations were arbitrarily set in a way that simply denied development without regard to regional growth demand or the community's service capacity.[20] To the extent a limit on the issuance of utility tap permits is tied to a utility study which demonstrates the need for such limitations, the utility permit cap may be preferred over the building permit cap. This is so because a reviewing court, engaged in a substantive due process analysis, is less likely to second-guess a decision to limit growth for the purpose of maintaining the flow of water and the treatment of sewage, than a decision based on the more subjective opinion of a desirable population size.[21]

Downzoning

Because zoning restricts an owner's right to use his property, downzoning has been viewed as a partial deprivation of the owner's property rights, albeit one that is constitutionally permissible provided it is reasonable under a substantive due process standard, does not constitute a taking of vested rights, does not go "too far" under the *Penn Central* analysis, and satisfies procedural due process requirements. Whenever due process rights exist, the affected owner is entitled to notice and a hearing as an opportunity to be heard regarding the proposed action.[22] The authority of any local government to zone property is also subject to the substantive due process condition that the exercise of such power must be for the promotion of the public health, safety and welfare.[23] In an effort to balance private property rights against such municipal interests, the courts have routinely held that growth management ordinances, given their effect on private property rights, must be enacted for some purpose other

than to merely stop future growth or to preserve the existing municipality as an exclusive paradise for those fortunate enough to be there first.[24]

The existence of a comprehensive plan has been considered by many courts as conclusive evidence that any zoning action consistent with it is, by definition, in the best interests of the public health, safety and welfare.[25] Conversely, some courts have held that the absence of a comprehensive plan may make a downzoning "suspect."[26] The benefit of having a comprehensive plan is to provide an answer to the substantive due process inquiry as to why the negative zoning action was taken.

Generally, the courts have held that, absent a statute or ordinance to the contrary, a property owner does not have any common law vested right to continued zoning approvals until after such time as the developer has obtained a building permit and taken substantial steps towards the construction of the project pursuant to the permit.[27] However, in some states, the common law of vested rights has been superceded by the enactment of statutes. Such statutes typically provide for the vesting of rights at a certain stage in the plan approval process and for the formation of vested development rights agreements between the landowner and the municipality.[28]

Under the *Penn Central* taking test, a downzoning also cannot go "too far" in terms of its economic impact on the property or the extent it interferes with reasonable investment-backed expectations. However, a regulatory taking usually is not found based on "economic impact" where the property retains some economically viable use or substantial economic value.[29] The Supreme Court has continually affirmed the government's ability to adversely impact the economic value of land by imposing land use restrictions.[30] For example, the Court has upheld land use restrictions that would potentially diminish the economic value of the land in question by more than 90 percent.[31] Nevertheless, the "economic impact" test is a subjective evaluation by the reviewing court, and some courts have placed a greater weight on the amount of the reduction in value resulting from a zoning regulation.[32]

Another method of controlling future growth is for a municipality to set time limits on its zoning approvals. Doing so helps the municipality to avoid the difficulties of "planning for the unknown," which can result when a municipality has a large number of "paper subdivisions" on its books.

The impact of a regulation on the owner's investment-backed expectations is often the dispositive factor in the *Penn Central* analysis.[33] The courts will look at the economic use or return a landowner could have reasonably expected to obtain on his or her investment in the acquisition of the land in question. There appears to be a growing consensus that courts must consider the "parcel as a whole" and evaluate not only the loss of value resulting from the downzoning, but also, the increase in value of that part of the owner's land that can be, or already has been, developed under prior regulations.[34] Among the factors a court can be expected to review are the amount of lost profits attributable to the downzoning, the market for the new development, the amount of profit already realized under the previous regulations, and similar "pre-regulation" and "post-regulation" financial information.

Time-Limited Zoning Approvals

Another method of controlling future growth is for the municipality to set time limits on its zoning approvals. Doing so helps the municipality to avoid the difficulties of "planning for the unknown," which can result when a municipality has a large number of "paper subdivisions" on its books.

The use of temporary zoning approvals raises the issue of whether a hearing is required before the termination of the prior zoning approval can become effective. There is some case law to the effect that such "automatic rezonings" are violative of the property owner's procedural due process rights. In *Spiker v. City of Lakewood*,[35] the Colorado Supreme Court struck down a provision of the city's zoning ordinance that provided for the automatic rezoning of property to its previous zoning category following the property owner's failure to file a plat of the property during the rezoning action. In doing so, the *Spiker* court embraced the rule that there can be no rezoning without notice and a hearing, and that automatic reversion would amount to a second rezoning of the property in violation of the procedural requirement of state law that rezonings be accomplished through notice and hearings.[36]

Implementing More Stringent Development Conditions

To control growth, a municipality may decide to institute more stringent conditions or impose higher fees for the development of property. These can be in the form of higher development fees and public land dedication requirements, as well as more stringent design and construction standards. The question of a municipality's authority to raise

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design and construction standards is similar to its authority to increase development-related fees. These may take the form of more stringent architectural regulations, minimum lot sizes, increased setbacks and similar regulations intended to encourage higher quality development. The general case law in this area is that, absent a state statute affording the owner vested rights in the owner's previous development approvals, or a development rights agreement with the municipality, a developer does not obtain any vested rights that would preclude the municipality from imposing new conditions for the issuance of building permits until such time as the developer obtains a building permit and starts constructing the project pursuant to the permit.[37]

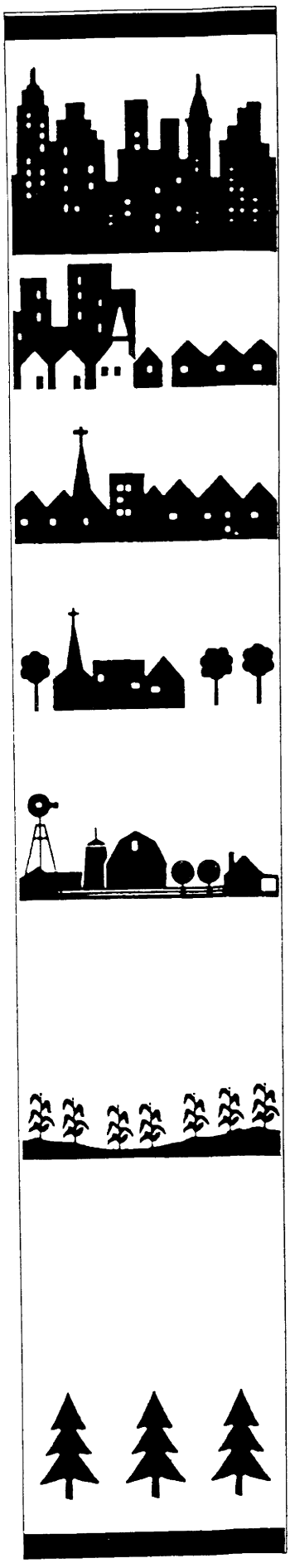
Courts have generally upheld the legislative authority of municipalities to raise fees and charges prior to issuing building permits. In *Lake Forest Chateau, Inc. v. City of Lake Forest*,[38] the Illinois Supreme Court held that the developer was responsible for paying the increase in building permit fees that occurred between the time the developer's original rezoning request was denied and the time the developer successfully obtained judicial relief of the denial, absent a showing that the city's action in increasing the building permit fees was wrongfully motivated. The increase occurred "across the board" for all developers in the city, and the court held that the developer was subject to the higher fees that were in effect at the time he finally qualified to obtain a building permit for his project.[39] In *P-W Investments, Inc. v. City of Westminster*,[40] the Colorado Supreme Court held that the city retained the right to impose park development fees and higher water tap fees on developers, notwithstanding the fact that the developers had a prior approved "official development plan" for their project. The court specifically found that the new fees were linked to the issuance of building permits and, therefore, could be collected in the amount prescribed by the city council at the time the application for the building permit was made.[41]

Conclusion

Prior to taking action to control local growth, a municipality must take into account the due process and takings concerns raised by the establishment of limits on private property development. The municipal attorney who takes the time to analyze the various growth management techniques that are available in terms of the due process and taking issues they raise will help assure the ultimate survival of the municipality's growth management measures.

Notes

1. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
2. *Id.* at 124.
3. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 326 (2002).
4. *Id.* at 337.
5. *Id.* at 332.
6. *Id.* at 342.
7. *Id.* at 338, n.32. The moratoria upheld by the Supreme Court in *Tahoe* had been extended for a period of 32 months. *Id.* at 331.
8. *Id.* at 341.
9. *Id.* at 341-42. *Cf.*, City of Boca Raton v. Boca Villas Corp., 371 S.2d 154 (Fla. App. 1979) (a growth limitation ordinance which had no reasonable relationship to municipal service capacities violated due process); Lakeview Apartments of Hunz Lake, Inc. v. Town of Stanford, 485 N.Y.S.2d 801 (N.Y.A.D. 1985) (moratorium adopted in 1977 and periodically extended beyond 1983 was invalid because of its unreasonable duration: "Although interim or stop-gap legislation is permissible in order to maintain the status quo pending the preparation and enactment of a comprehensive zoning ordinance, the life of such legislation may not exceed a reasonable period of time").
10. *See, e.g.*, Monmouth Lumber Co. v. Ocean Tp., 87 A.2d 9 (N.J. 1952) (one-year "stop gap" ordinance temporarily downzoning industrial zoned property to residential); McCurley v. City of El Reno, 280 P. 467 (Okla. 1929) (one-year interim ordinance downzoning business to residential sustained).
11. *See, Annotation, Validity and Effect of Interim Zoning Ordinance*, 30 A.L.R.3d 1196, section 5 (1970 Supp. 1994).
12. *See, e.g.*, State ex rel. Fairmount Center v. Arnold, 34 N.E.2d 777, 781 (Ohio 1941) (interim zoning ordinance enacted without following statutory notice and hearing requirements for zonings and rezonings denied owner its property without due process); Kline v. Harrisburg, 68 A.2d 182 (Pa. 1949) (interim ordinance prohibiting construction of apartments and townhouses enacted in violation of procedural requirements of state zoning statute invalid).
13. Annotation, *Validity and Effect of Interim Zoning Ordinance*, 30 A.L.R.3d 1196, section 5 (1970 Supp. 1994).
14. 522 F.2d 897 (9th Cir. 1975).
15. *Id.* at 901.
16. *See, e.g.*, Home Builders Ass'n of Cape Cod, Inc. v. Cape Cod Comm'n, 808 N.E.2d 315 (Mass. 2004) (adoption of ordinance imposing annual building permit cap was a legislative act and courts could not "second guess" such decisions unless they were in violation of the constitution or state statute).
17. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 263 n. 9 (1980).
18. JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT, § 3.3 (2d ed. 2004) and cases collected therein.
19. *See, e.g.*, Begin v. Inhabitants of Sabattus, 409 A.2d 1269 (Me. 1979).
20. *See, e.g.*, City of Boca Raton v. Boca Villas Corp., 371 S.2d 154 (Fla. App. 1979).
21. *Compare* Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 879, 901 n.1 (9th Cir. 1975) (upholding cap, the court found that the building permit cap was based, at least in part, on the availability of water) and City of Boca Raton v. Boca Villas Corp., 371 S.2d 154, 157 (Fla. App. 1979) (invalidating cap, the court upheld the trial court's factual finding that there was no utility based reason for the cap).
22. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 567(1972).
23. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
24. National Land & Investment Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (zoning ordinance whose primary purpose was to prevent the entrance of newcomers was invalid); *see also*, Beck v. Town of Raymond, 394 A.2d 847 (N.H. 1978) (towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge; they must develop plans to ensure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner).
25. *See, e.g.*, Sprenger, Grubb & Associates, Inc. v. City of Hailey, 903 P.2d 741 (Idaho 1995) (downzoning of property from general commercial to limited business was in accord with the comprehensive plan and bore a reasonable relationship to the city's goals; therefore, it was not arbitrary or capricious).
26. *See, e.g.*, Bd. of Supervisors of Fairfax County v. Snell Const. Corp., 202 S.E.2d 889



Managing
Maryland's Growth
Models and Guidelines

Adequate Public Facilities

14

The Maryland Economic Growth,
Resource Protection, and Planning Act of 1992

The Maryland Office of Planning

State of Maryland
Parris N. Glendening, *Governor*

Maryland Office of Planning
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MARYLAND *Office of Planning*

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I. INTRODUCTION

What is APF ?

Another angle on the same old problem.

The phrase "adequate public facilities" has an appealing ring to residents, public officials, and developers in many fast-growing suburban areas where schools are chronically overcrowded, long delays occur at congested intersections, not enough ballfields are available for recreational leagues, and water rationing becomes necessary during dry summer months.

Adequate Public Facilities laws are an effort to rein in 'runaway' development until facilities can be made adequate. APF, an adequate public facilities law, bases development approvals under zoning and subdivision laws on specifically defined public facility capacity standards. They are designed to curtail development in areas where public facilities are inadequate, and to delay development in planned growth areas until adequate service levels are in place or reasonably assured.

In plain English, APF laws say that if the roads are too congested, if the school classrooms are too crowded, if the water system cannot provide enough water, if the sewer pipes or treatment plant are full, or if there are not enough playing fields for recreational use, ***then,*** *development cannot be approved until the problem is corrected.*

Almost any county or city will find that its citizens feel that more services and facilities are desirable, and public officials are always pressing against the affordability barrier to meet these "needs". However, the crisis occurs in those growing jurisdictions, usually suburban counties, where there is a visible and sudden decline in the availability of various public facilities.

In the context of various means of responding to this problem, APF laws are more structured than specifically enacted legislative **moratoriums** which are generally last ditch efforts to control conditions where there are serious deficiencies. **Impact fees**, on the other hand, provide a means to raise additional funds for capital projects, but do not guarantee that sufficient funds will be available, and meanwhile have no effect on the pace of development.

Adequate public facilities laws can be important growth management tools for rapidly growing counties and municipalities. APF laws are also an important and valuable tool for implementing the Visions of the Planning Act of 1992, particularly the first vision, which calls for concentrating growth in suitable areas. The premise of APFOs is that growth should be directed to *suitable* areas where the facilities are adequate, by

restricting it in areas where certain public facilities are inadequate. There is a particularly strong State interest in this issue, because considerable amounts of State funds are directed to constructing school, sewer and water facilities, roads, and parks.

Why is it needed?

Is anyone paying attention?

Many citizens attribute congestion and facility inadequacy to "lack of planning" or "poor planning". In most situations the planning is definitely there, but the ability to target facility investment to the appropriate location at the appropriate time is hampered by two factors:

- Very few jurisdictions can afford to build facilities in advance of the need.
- Local zoning and development regulations rarely provide exact control over the locations and rates of construction from year to year.

Adequate public facilities efforts become necessary when a local government's coordination of development and public facility construction fails. Fast-growing suburban jurisdictions, in particular, find themselves suddenly in situations where intersections are congested, school classrooms are overcrowded, inadequate water supply is available during summer drought periods, or sewer pumping stations are overflowing during peak periods. Adequate public facilities laws are frequently thrown in place as stopgap measures after problems have already manifested, but, when designed and enacted in a timely manner, they can provide a valuable means of ensuring wise and efficient investment in capital facilities.

II. APF AND THE PLANNING ACT OF 1992

Achieving the Visions

A carefully designed APF program applied in an appropriate setting can contribute significantly to meeting the Visions of the Planning Act.

An APF law can back up a land use plan that **concentrates growth in suitable areas**, by restricting growth in areas where facility development is not programmed.

An APF law can promote the **conservation of resources** by avoiding expenditures for redundant facilities.

An APF law that is carefully crafted as part of a larger growth management program can **promote economic growth and regulatory streamlining** by providing a clear and dependable schedule of capital investment and facility capacity.

An APF law **addresses funding mechanisms** by maximizing the efficient use of capital investment dollars.

III. Is an APF law the right tool for your jurisdiction?

Look before you leap.

The premise that adequate facilities should be available for new growth seems obvious, and its execution, it follows, should be simple. But the experience in Maryland (as well as other States) has been that implementing an effectual, consistent, streamlined, and fair set of regulations is not as easy as it might seem. For instance:

- Can the standards for adequacy be justified under the law, and can it be sustained in Court that there would be serious public harm, or threat to public health, safety, and welfare if the standard were to be exceeded?

- Does your jurisdiction's growth management program provide a coherent context for an APF program? That is to say, do you have a clear idea of what facilities are needed at what locations to accommodate planned growth? Is there a facilities plan or capital improvement program that indicates a commitment to investing in the needed facilities?

- Can agreement be reached in your community as to what is an adequate (and in some cases, affordable) level of service for various public facilities? Are you satisfied to aim for ***'adequate'*** levels of service or do you need to identify the ***'optimal'*** level?

- Can APF laws be integrated into a growth management program to provide a consistent result? For instance, roads in rural areas tend to have more capacity for growth because the volume of traffic using them is so much less. An APF law based on road capacity could have the unintentional effect of pushing growth out of planned growth areas into rural/agricultural areas. Similarly, an APF law that is based on road safety standards (to address width, sight distance, shoulder obstruction problems in rural areas) may pose problems when applied county-wide.

- Can APF laws be designed to be consistent with local and State capital improvement programs and funding mechanisms? Another example is that school funding from the State for additional capacity is generally not available unless overcrowding exists or is projected within five years of a request for funding; an APF law that kicks in prematurely or uses unwise standards could have the unintentional effect of preventing the funding of school construction to provide capacity in planned growth areas.

- Can the APF law be administered without unintentionally complicating the development review and approval process, and

without delaying development unnecessarily in areas where economic development is being promoted?

- Can you provide sufficient data and staff resources to monitor growth trends and facility capacity?

IV. Legal Framework and Background

In 1978, the Maryland General Assembly passed Article 66B, §10.01, specifically enabling municipalities and non-charter counties to adopt adequate public facilities ordinances. Even prior to that date, Maryland courts upheld the ability of local jurisdictions to adopt ordinances that condition development approval on a finding that infrastructure exists to sustain a project's anticipated impacts. In *Malmar Associates v. Prince George's County*, 272 A.2d 6 (1971), the Court of Appeals sustained an ordinance requiring an applicant to show that adequate educational facilities were in place. In the early cases, authority to enact an adequate public facilities ordinance was usually implied, based upon the general authority to promote public health, safety and welfare that underlies zoning, planning, and subdivision regulations. In 1992, the scope of §10.01 was expanded to enable all local jurisdictions in Maryland, including charter counties, to enact a variety of growth management tools.

Adequate public facilities ordinances can be either a response to a crisis in existing capacity or the financial overburden on services required for new development, or part of a comprehensive review of the long range demand for public services and facilities. In either situation, the requirements must be reasonably and rationally related to a valid governmental interest. Approval can be made contingent on the local government's ability to provide services, or on a developer's agreement to furnish or finance the needed improvements. The standard in Maryland requires that adequate facilities be reasonably probable of fruition in the foreseeable future. (*Montgomery County v. Greater Colesville Citizen's Association*, 70 Md. App. 374, 521 A.2d 770 (1987))

APFOs should set quantifiable levels of service for public facilities and services, since these standards provide basis for the evaluation of the proposed projects in relation to existing or planned facilities. Lack of identifiable standards can lead to invalidation of the regulations or conditions as applied, as in the case of *Rosenberg v. Maryland-National Capital Park and Planning Commission*, 269 Md. 520, 307 A.2d 704 (1973). In that case approval of a subdivision had been denied based on inadequate educational facilities. The regulation in question required adequate schools "within a reasonable distance." However, the Court of Appeals found that this standard was so general that the Planning Commission was required to consider the school capacity within a mile and one-half of the proposed development, not just the capacity of the nearest elementary school.

One unresolved legal issue is the ability of a local jurisdiction to disapprove development based upon the inadequacy of facilities outside the control of the local government. One legal treatise suggests that agree-

ments with facility providers may be necessary to ensure consistency with overall community growth objectives. (Rathkopf, *The Law of Zoning and Planning*, §13.06 (4th edition))

V. INTEGRATING APF WITH THE LOCAL GROWTH MANAGEMENT PROGRAM

Keep both oars in the water.

A thorough and comprehensive growth management program should function so that land use planning and facility planning are linked and interdependent from beginning to end. Long-range planning for growth should be conducted to ensure that a jurisdiction's financial ability to provide necessary facility improvements is not exceeded; and also that the capital facility plans are sufficient to accommodate the projected growth, and are consistent with the policies for locating future growth.

While an APFO can be an extremely valuable planning tool, it must be applied in combination with many other planning tools, and in the context of a broader, comprehensive growth management program. Integration of facility planning with land use planning can be viewed in an ideal sequence of four stages of the development planning process to understand the context of APF laws.

1. **Master Plan stage**: A long range look at the location of anticipated growth and the public facility infrastructure necessary to support it. A land use plan that describes the location and intensity of growth must be followed by a community facilities plan which describes the existing facilities, and a list of new and upgraded/expanded facilities which will be required to provide the services which the community requires (or aspires to) over the subsequent 10-20 years. The list and price tag for the facilities which are generated by this process are usually staggering to local officials, but it is important not to ignore the reality of the fiscal demands that will be made by growth. Failure to confront this reality leads to the crisis situations that cause the demand for APF laws.

2. **Zoning and Capital Improvement Programming**: Zoning should be phased with existing capacity and with the short term capital improvement program. A thorough and clear community facilities plan can provide a reasonable basis for making these zoning decisions. The community's zoning ordinance should address facility adequacy for both piecemeal and comprehensive rezoning requests, ensuring that adequacy standards are achievable within a reasonable time. The annual Capital Improvement Program (CIP) should be based on the community facilities plan, existing deficiencies, and synchronized with the zoning.

3. **Development approval stage**: APF laws are generally enacted at this stage to regulate approvals of subdivisions or site plans. They can be seen as a safety mechanism for unexpected growth spurts.

4. **Building permit stage**: Actions to halt building permits are usually in the form of a legislative moratorium that is based on evidence of serious deficiencies with no immediate solution. In the case of water and sewer facilities, administrative, rather that legislative action can halt the approval process.

VI. Municipal Applications of APFOs

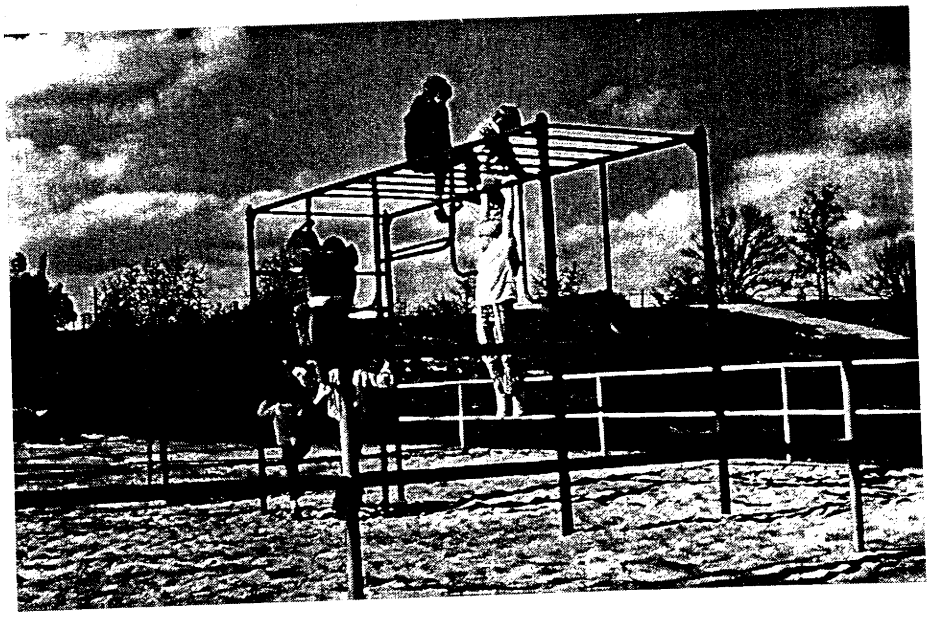
Interjurisdictional Coordination and Communication

While APFOs are most applicable for growing counties with growth management programs, municipalities should consider whether some circumstances may warrant their use.

For instance:

- Annexation petitions must consider the availability and extension of public services. An APF law could provide a set of specific standards and conditions for approval of an annexation petition.

- Municipalities that are located in counties with APF laws may consider similar APF standards to promote interjurisdictional coordination particularly where facilities such as roads and schools are not constrained by jurisdictional boundaries.



VII. EVALUATION

Advantages and Disadvantages

An APFO can be an important addition to a local government's regulatory toolbox that will help ensure a high quality of public facilities and services by providing a mechanism to "calm" the effects of volatile cycles of development and construction.

An APF law can help maintain the fiscal integrity of a government by helping to reduce the demands for excessive borrowing to finance new facilities which are demanded by unexpected growth. Fiscal stability and high bond ratings are important factors to businesses considering new locations.

An APF law can help direct growth to suitable areas where there is capacity for growth and thereby contribute to the fiscal stability of the government as well as support the revitalization of older urban areas where facilities have the ability to absorb growth.

An APF law can be an extremely valuable planning tool when applied in combination with other planning tools, and in the context of a broader, comprehensive growth management program that includes:

- A policy for concentrating growth into designated service areas.
- A policy for conserving rural areas for agricultural use and natural resource protection.
- A policy for directing resources to revitalize existing communities.

While APFOs are often seen as anti-growth mechanisms, a properly designed program will in fact facilitate economic growth and serve to streamline regulatory mechanisms.

- A coherent APF law, especially in combination with a thorough growth management program provides clear guidance to developers on when and where development will be allowed, avoiding unexpected delays.
- Annual reporting and evaluation creates accountability on the part of local government officials by highlighting facility inadequacies, and imposing development moratoria.
- APFOs must be accompanied by a plan and a commitment by the local government to providing the facilities to support growth in a reasonable manner; otherwise, the ordinance will undoubtedly be

perceived as anti-growth, and an attempt to force developers to pay the cost of off-site facility improvements.

Adequate Public Facility ordinances work best where the volume of development far exceeds the ability of a local government to keep up with the demand for public facilities.

Otherwise, the complexity and administrative costs of enacting and maintaining the APF program might not be justified. An APF law requires considerable work:

- To integrate with the existing zoning and subdivision regulations in a functional manner;
- To create a fair process for stopping development approvals (subdivision or building permit?);
- To determine what will be grandfathered, and for how long;
- To establish a 'waiting list', or pipeline, for developments that could be approved when the APF standards are met;
- To establish a process to ensure there will be sufficient data collection, development monitoring and projections, and facility capacity.

VIII. Steps in Designing an APF Program

A. Initial Assessment

1. *Does the disease justify the cure?*

Carefully examine the nature and severity of the problem before embarking on what will undoubtedly be an arduous and controversial effort. Ask yourselves, 'can it wait?'. Are there other, simpler means to achieve the same result? You might consider updating the facilities plan and inventory, and possibly the development regulations: also, adding staff, and/or improving the collection and analysis of data on existing and projected facility capacity

2. *Is the overall growth management plan in order?*

If you don't have a clear idea of the facility demands of the projected growth in your jurisdiction, and further, if you don't have any plan or policy for meeting those demands, then an APFO is probably a premature response.

3. *Do you have community support for this effort?*

It is important that the effort involve citizens, developers, and other community business and civic leaders to maintain a balanced approach and a clear understanding of the objectives and probable outcomes of the effort. It will be particularly valuable to involve a variety of people with technical expertise, such as engineers, bankers, school administrators.... Elected officials have a dismaying tendency to lose heart when the legislative process gets complicated by various confusing claims about the impact and outcomes.

4. *Can you afford the staff effort?*

Develop a clear work program and schedule, and determine the staff resources available for preparing, enacting, and especially, implementing the APF law. It may be appropriate to develop the law incrementally, i.e. one facility at a time.

5. *Can you afford the results?*

Take the time to test the outcomes of proposed regulations on different types of developments (e.g. residential, commercial, institutional), in a variety of specific areas around your jurisdic-

tion. Make sure it is achieving your objectives, and make sure you can afford the results. As previously mentioned, an APFO can have the inadvertent effect of making it easier to develop in rural areas. Also, it will definitely be the case that an APF law may stall or prevent an economic development project that is otherwise attractive and desirable.

B. Guidelines for Modifying the Comprehensive Plan

1. Assess existing and future facility needs based on projected growth.

This should include an analysis of the optimal level of service, as well as the minimum adequate level of service.

2. Establish policies on facility adequacy to guide zoning and capital improvement program decisions.

3. Establish implementation procedures

- Standards for comprehensive and piecemeal rezonings.
- Linkage between the Plan and the Capital Improvement Program.
- APF standards in the subdivision and zoning laws.

C. Setting Up an APF Ordinance

1. Facility priorities

Water and sewer facilities: Adequacy standards are based on very clear engineering standards and physical limitations, and as a result are the easiest to justify. However, ensuring a regular and clear reporting of capacity and utilization, and estimating the impacts of particular developments, or development scenarios, can open a can of worms if you are not prepared to provide this information.

Schools: Generally the easiest facility to reach a consensus and to have strong public support. State standards on school capacities (which are the foundation for funding priorities), provide a good basis for the adequacy standards. Since funding priorities, school

district boundaries, and enrollment projections are made by the Board of Education, not the county or municipal government, it is imperative that school department staff be involved, and committed to working cooperatively with the County in pursuing the growth management policies.

Roads: One of the primary reasons for APF laws to be enacted, but the most difficult to reach agreement on adequacy standards, fairness of application, and impact of the regulation. Allow plenty of time for technical review, public review, and analysis of the impacts.

Police: The level of service is more a function of the number of uniformed officers available, than it is of the availability of particular facilities. Administrative buildings and detention facilities clearly must be analyzed in any facility planning effort.

Fire and Emergency Services: Approach to this depends on whether there is a volunteer or professional department. Availability of services within certain response times is a function of the location of stations. Insurance companies have standards for response times that can be of assistance.

Parks and Recreation Facilities: In the first place, there are **never** enough. It might be better to look at on-site provision of facilities as a subdivision approval requirement, or impact fees.

Solid Waste: It is difficult to assign the impact of new developments to solid waste facility inadequacies.

2. *Establish a thorough public review process*

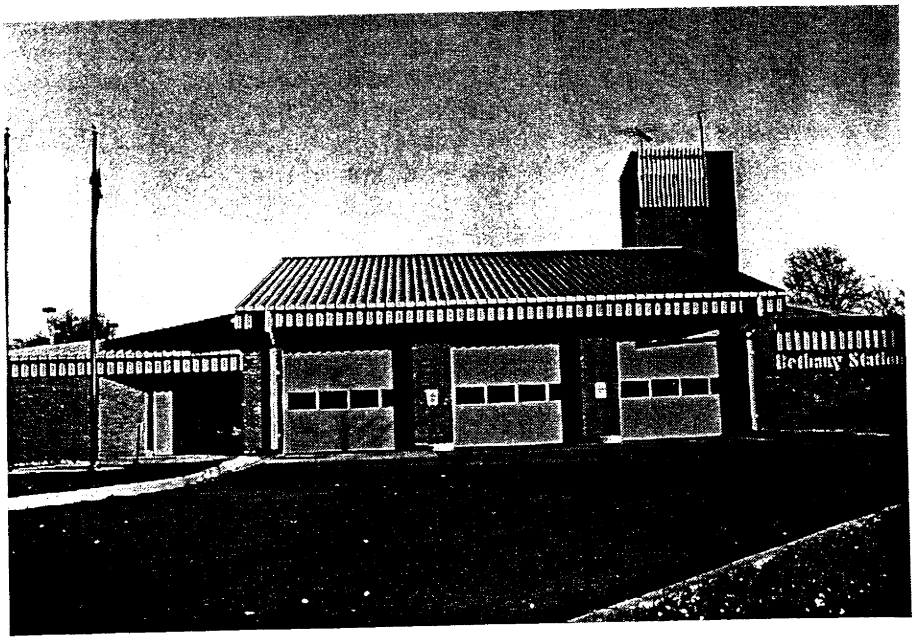
Include broad representation from the community, particularly lawyers, bankers, engineers, and land planners who are familiar with the intricacies of the development process, and the unique characteristics of the development regulations in your jurisdiction.

3. *Address the linkage of County and Municipal regulations.*

Coordination of efforts between the County and municipalities can help avoid development and annexation occurring to circumvent the APF law.

4. Components of an APF law

- Establish a process for collecting the information on facility use, capacity standards and projected growth.
- Set the standards for adequacy.
- Determine the stage of development approval where this will apply.
- Determine applicability (residential/ non-residential), exemptions (e.g. elderly housing).
- Determine appeals process (if not already covered by zoning or subdivision provisions).
- Establish a queing process, or a 'waiting list' for developments that could be approved if the APF standards were met.



IX. Adequate Public Facilities Ordinances In Maryland

The purpose of this Section is to provide an overview of the use of Adequate Public Facilities Ordinances (APFOs) by local jurisdictions in Maryland. The summary will focus primarily on counties, identifying those which have adopted APFOs and highlighting different approaches taken on several key components of an APFO including: type of facilities evaluated; level of service standards; timing; mitigation; exemptions; and expiration. The final portion of this Section will highlight major features of municipal APFOs. The information contained in this chapter was derived from a survey of local jurisdictions conducted by staff of the Maryland Office of Planning.

Identification of APFO Counties

As of December, 1995, twelve counties have adopted some type of APFO. These counties, generally located in the Baltimore-Washington metropolitan area, include Anne Arundel, Baltimore, Calvert, Carroll, Charles, Frederick, Harford, Howard, Montgomery, Prince George's, St. Mary's and Washington Counties (see Map on page 20.) The counties are experiencing significant growth pressure and public services and facilities are straining to keep up with the demand.

Types of Facilities

The types of facilities examined for adequacy in APFOs vary according to the jurisdiction and its public facility needs. Ten of Maryland's twelve APFO counties test for adequacy in four areas including roads, schools, water and sewer facilities. Other public facilities tested, but to a lesser extent, include: police and fire protection, stormwater drainage, health care, and solid waste disposal. The table on page 29 identifies facilities which are tested for adequacy by each county.

Level of Service Standards

Most of Maryland's APFO counties have established specific level of service standards for determining facility adequacy. These standards, which have become more complex over time, are generally based on existing service levels or service levels counties are striving to achieve. Level of service standards appearing in county APFOs are discussed generally below. More detailed information relating to specific standards and administrative provisions is provided in tables on pages 30 to 38.

Schools

Twelve counties have established level of service standards for school adequacy. School adequacy is generally determined by comparing the capacity of the school with existing and projected school enrollments. However, the counties have varying standards for determining school capacity and identifying overcrowding or adequacy.

Most counties utilize various thresholds of the State Rated Capacity, as established by the Interagency Committee on School Construction (IAC), as the basis for determining school adequacy. The State Rated Capacity is defined as the maximum number of students that reasonably can be accommodated in a facility without significantly hampering delivery of the educational program. The IAC has established a State Rated Capacity for each public school facility in the State by multiplying the number of classrooms/teaching stations by the State approved capacity:

Prekindergarten Classrooms	x 20
Kindergarten Classrooms	x 22
Grades 1 - 5/6 Classrooms	x 25
Grades 6-12 Teaching Stations	x 25 x 90%
Special Education Classrooms (self-contained)	x 10

Adding these totals will yield the State Rated Capacity for the particular school.

The majority of counties utilize the State rated capacity as the basis for establishing their own thresholds of adequacy. For example, Washington County considers a school to be adequate if student enrollment does not exceed 105% of the State Rated Capacity. Other counties such as Charles and Harford, allow school enrollment to reach 110% and 120%, respectively, of the State Rated Capacity before a school is considered inadequate. Frederick County has established different thresholds of adequacy, based on the State Rated Capacity, for elementary schools (105%) and for secondary schools (110%).

Special APFO provisions relating to the adequacy of schools are noteworthy. For example, the State Rated Capacity standard in Anne Arundel County can be exceeded if the Board of Education determines that the quality of the curriculum and programs will not be adversely affected. Also, several counties include an option for the Board of Education to consider redistricting if a school in an adjacent district is under capacity. This option permits the excess capacity at the adjacent school to be counted as available capacity.

Roads

Road capacity is another major consideration when evaluating the impact of a proposed development on a county's infrastructure. All of the counties with APFOs evaluate road capacities in the vicinity of proposed developments to some degree. Most generally rate components of their transportation network by assigning "levels of service" (LOS) to their roads and intersections. These "levels of service", which are generally based on the Highway Capacity Manual published by the Transportation Research Board, are indicated by letters ranging from "A" (free flowing) to "E" (heavily congested). Most county APFOs require that levels be no worse than level "C" or "D" or that appropriate improvements are planned in the Capital Improvements Program (CIP) to bring these roads and intersections up to the desired level of service. For example, Howard County specifies a minimum LOS of "D" for County roads and "E" for State roads.

From a growth management perspective, a number of counties allow a higher level of congestion (lower level of service) in designated growth areas in an effort to accommodate new development or redevelopment in these areas. For example, Montgomery County has adopted a policy allowing higher levels of traffic congestion around transit stations. In Harford County, intersections outside planned growth areas must maintain a LOS "C" while intersections within planned growth areas are allowed to drop to LOS "D". Another example is Calvert County, which requires a LOS"C" for roads and intersections, except in town centers where LOS "D" is permitted.

Most counties surveyed require the developer to submit a traffic impact study for the proposed project. This study attempts to predict the off-site impacts of a proposed development on the surrounding highway network. These studies have tended to become more complicated as APFO standards have grown in sophistication.

Water and Sewer

Ten counties evaluate the adequacy of both water and sewer facilities. Most of the counties require the proposed development to be served by adequate water and sewer facilities, which are either existing or planned in the near future. However, the method of evaluating adequacy varies from jurisdiction to jurisdiction. Some counties test for adequacy by examining the comprehensive water and sewer plan while other jurisdictions rely on the CIP or a general review and approval by the appropriate county and State agencies.

Montgomery County, for example, requires that a subdivision be located where water and sewer service is available, under construction or desig-

nated within the first two years of a current approved water and sewer plan. On the other hand, Frederick County, relates the adequacy test for water and sewer facilities to the CIP and considers water and sewer facilities adequate if improvements are scheduled in the first three years.

Washington County requires the Planning Commission to determine the adequacy of water and sewer systems after reviewing the evaluations and recommendations of the appropriate city, county and State review agencies. In Washington County, the entire sewerage system, including laterals, interceptors, pumping stations, treatment plants, points of discharge, is evaluated to ensure it is not overburdened by a proposed development.

Stormwater Drainage

Only Anne Arundel, Prince George's and St. Mary's Counties assess the adequacy of stormwater management. Anne Arundel and St. Mary's Counties evaluate the adequacy of both the on-site drainage systems and off-site downstream drainage systems. Both storm drainage systems are considered adequate if contracts have been awarded and construction is expected to be completed before the first building permit is issued.

Health Care

Montgomery County is the only county which evaluates the adequacy of health care facilities. It requires that the tract or area to be subdivided should be situated so as to not involve danger or injury to health, safety or general welfare. Such danger or injury is deemed not to exist when physical facilities such as health clinics, police stations and fire houses in the service area at the time of preliminary subdivision are adequate or are scheduled in the CIP.

Fire

Six counties have established fire protection standards. These standards vary from detailed standards relating to response time and fire station equipment capacity in Prince George's County, to more general standards relating to the adequacy of the water distribution system or sprinkler systems in Anne Arundel and St. Mary's Counties, respectively.

Washington County's ordinance requires adequate interim fire protection systems in new commercial and industrial development which are located in designated urban or town growth areas where public water service is not anticipated within two years. This interim fire protection system must be capable of providing the same level of fire protection as if it were connected to the public water system.

Police

Prince George's and Montgomery Counties evaluate the adequacy of police facilities as part of their APFO review process. Prince George's County has developed a detailed methodology for determining the number of additional police officers needed and the capacity of each police station in the County. The provisions in Montgomery County's APFO relating to the adequacy of police facilities are the same as those previously stated under the health care section.

Solid Waste Disposal

Carroll County addresses the adequacy of solid waste disposal facilities in its APFO. Solid waste management facilities are certified as adequate to serve a proposed development if there is at least ten years of land space designated, approved and licensed by the Maryland Department of Environment (MDE) for use as a Sanitary Landfill within the County. In addition, the following conditions must also be met: (1) a licensed, active cell with no less than two years of capacity, or (2) a future cell of no less than four years of capacity which will be operational within one year, or (3) an alternative method of solid waste management which has been approved by MDE and implemented which provides for the collection and disposal of solid waste materials for a period of no less than two years.

Timing of the APFO Tests

An important issue in determining the adequacy of public facilities is the timing of the review. Nine of twelve APFO counties apply the various tests for adequacy at the time of the filing of the preliminary subdivision plat. Anne Arundel and Baltimore Counties require compliance with the required adequacy tests before final subdivision plat approval. Howard County tests for adequacy at the sketch plan stage. (See table on page 37.)

Mitigation

Mitigation refers to actions a developer may take to improve deficient facilities to obtain compliance with the adequacy tests. A developer may select this option to accelerate the approval process. The only other recourse is to wait until the County makes the needed improvements.

Direct cash contributions or the actual construction of the necessary improvements are the most common types of mitigating actions found in the APFOs. For example, Anne Arundel, Calvert and St. Mary's Counties permit developers to make the improvements needed to meet the APFO test for schools and roads or contribute to the financing of these improvements. Another example is Montgomery County, which allows a variety of mitigating actions, including ride sharing programs, developer contributions for road improvements or construction of improve-

ments and funding of transit. In Charles County, mitigation may include the dedication of property to the County, payment of impact fees, fees-in-lieu of an improvement payment to an escrow account, participation in private/public partnerships, developer agreements, off-site improvements or other mechanisms as may be determined by the Planning Commission. In Howard County, modest mitigation requirements are offset by an excise tax which funds road improvements.

Exemptions

Five counties exempt minor residential subdivisions from one or more of the APFO tests. These counties include: Frederick, Prince George's, Charles, Baltimore and Howard. In Howard County, for example, minor subdivisions are exempt from the adequate road facilities test, but they are required to pass the tests for adequate public school facilities.

Harford, Charles and Washington Counties exempt housing for the elderly from compliance with the APFO school adequacy test. Montgomery County exempts places of worship and residences for staff, parish halls and additions to schools associated with places of worship. In addition, a partial exemption from the roads test is allowed for selected affordable housing, small scale development and some small health care facilities. In Frederick County, developments which generate less that 25 peak hour trips are exempt from the roads test. Baltimore County exempts industrial development, hospitals and grandfathered lots. Charles County exempts a development that does not generate more than 25 students from the school adequacy test. A number of counties also exempt family conveyances.

From a growth management perspective, it is interesting to note that Washington County exempts proposed detached or semi-detached residences in designated Urban Growth Areas or Town Growth Areas from the school adequacy test. Another example is provided by Baltimore County, which exempts any development in a town center or community center for which an official site plan has been approved by the Planning Board.

Expiration of APFO Approval

The validity period for an Adequate Public Facility (APF) approval varies greatly depending on the county. In Frederick County, APF approvals are valid from three to ten years from the time of preliminary subdivision approval depending on the size of the project. APF approvals for residential subdivisions with less than 100 units are valid for 3 years, while approvals for subdivisions of more than 500 units are valid for 10 years. In Anne Arundel County, the APF test is applied at final plat approval

and is valid for as long as the plat is valid. Furthermore, if a public works agreement is entered into within two years the approval is valid indefinitely.

Municipal APFOs

Eleven municipalities in Maryland have APFOs[1]. Included is the City of Rockville, which uses both administrative and technical guidelines to assess traffic impacts of proposed development as part of the City's decision-making process. The Rockville guidelines require a standardized methodology for traffic studies which must be prepared by the developer. The other municipalities use APFOs to address a broader range of public facilities, much in the same manner that counties use APFOs. These APFOs typically address schools, roads, water, sewer, stormwater drainage, police, and fire safety.

In some areas, the municipalities' approach to APFOs is to model the process after the county, including adoption of county standards. This is the case for certain towns in both Carroll and Frederick Counties. Another common practice is to use language in the zoning ordinance and subdivision regulations to address APFO reviews, rather than create a separate APFO ordinance.

As a model for the State's larger municipal jurisdictions, the APFO process in the City of Laurel is noteworthy. Laurel has formal administrative procedures and criteria to guide APFO reviews as part of subdivision and site plan reviews. The City's APFO is a thorough and formal approach that touches upon several issues.

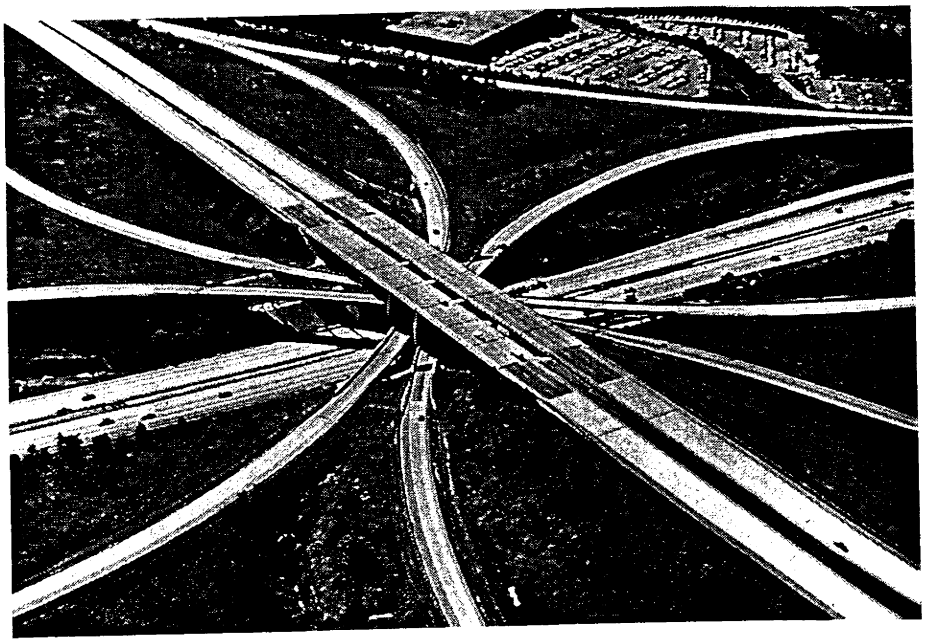
One important issue for municipalities is that some of the facilities deserving an adequacy review are beyond the control of the municipality. Laurel's APFO authorizes the City to consider impacts of proposed development on facilities beyond the immediate control or jurisdiction of the City. This provision allows Laurel to protect the adequacy of nearby schools used by City residents, and the adequacy of highways serving City residents and providing linkages between the City and other locales.

Interjurisdictional issues are also important to municipalities. Laurel's APFO calls for notification to, and requests participation by, non-City agencies. The APFO mentions the Maryland-National Capital Park and Planning Commission; Prince George's, Anne Arundel, Howard, Mont-

[1]Indian Head, Westminster, Manchester, New Windsor, Hampstead, Sykesville, Poolesville, Thurmont, Rockville, Boonsboro, and Laurel.

gomery, and Howard Counties; the Washington Suburban Sanitary Commission and Metropolitan Transit Authority; private utility companies, and the State Departments of Transportation and Environment and the Maryland Office of Planning.

Laurel's APFO also requires formal staff recommendations and findings of fact, and contains special procedures for floating zones, annexation proceedings, and other special zones within the City.



Appendix A:
County APFO Summary Tables

APPENDIX B: DIRECTORY OF PLANNING AGENCY CONTACTS

This directory is provided for persons wanting more detailed information about the Adequate Public Facilities Ordinances cited in this report. All county planning agencies in Maryland which contributed to the information provided in this report are listed.

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